IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANIEL FITZGERALD SMITH,
Appellant.

No. 2 CA-CR 2012-0408
Filed March 12, 2014

Appeal from the Superior Court in Pima County
No. CR20111687001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Judge:

¶1 After a jury trial, Daniel Smith was convicted of two counts of misconduct involving a weapon. The trial court sentenced him to concurrent, presumptive, 4.5-year prison terms. On appeal, Smith argues the court erred by denying his motion for a competency examination pursuant to Rule 11.2, Ariz. R. Crim. P. He also argues the court's jury instructions improperly shifted the burden of proof at trial to him. For the reasons that follow, we affirm in part and vacate in part.

Factual and Procedural Background

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In May 2011, Smith attended a convention for firearm buyers and sellers. He attempted to purchase a shotgun from a licensed dealer, but when the dealer presented him with a federal background check form Smith replied that he could not complete it. The dealer suspected that Smith was prohibited from possessing a firearm and reported him to Tucson Police Department detectives working undercover at the event. The detectives later watched Smith purchase a .22-caliber rifle from a private seller. As Smith was leaving the convention, detectives confronted him. They noted that he was carrying the rifle, as well as a .32-caliber revolver and a rifle barrel. Because the detectives were unable to determine that Smith was a prohibited possessor, they let him leave the convention with the guns. Shortly thereafter, detectives confirmed that Smith had been convicted of a felony in cause CR20101256001. They obtained a warrant and arrested him at his residence. Detectives also later

recovered the rifle, revolver, and rifle barrel from Smith's brother. Smith was charged with two counts of possession of a deadly weapon by a prohibited possessor.

¶3 In June 2011, Smith filed a motion requesting a competency examination. His counsel stated that Smith had "a history of mental illness and sporadic compliance with medication and mental health treatment," and that, during the proceedings for the underlying felony conviction in cause CR20101256001, the court had initially found him incompetent. Counsel argued that Smith "becomes too agitated to assist counsel or meaningfully communicate" and that "[h]is thought process is disjointed and oftentimes irrational." At a hearing on the motion, counsel again stated that "[Smith] isn't able to sit down and rationally discuss decisions." The court ultimately concluded Smith had "provided insufficient information" to move forward with a psychological evaluation and denied the motion.

¶4 The case proceeded to trial, where Smith objected to the court's jury instructions regarding the burden of proof, arguing that it was the state's burden to prove that his right to possess a firearm had not been restored and that the firearms were operable. The court overruled his objection, concluding that Smith had the burden to prove these facts as exceptions to weapons misconduct. The jury found Smith guilty on both counts, and the court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Competency Examination

¶5 Smith argues the trial court erred by denying his motion for a competency evaluation pursuant to Rule 11.2. A court has broad discretion in determining whether a competency evaluation is warranted, and, "unless there has been a manifest abuse of this discretion, we will uphold its actions." *State v. Lane*, 128 Ariz. 360, 361, 625 P.2d 949, 950 (App. 1981).

¶6 A trial court is required to order a Rule 11.2 psychological examination for a defendant only if reasonable grounds exist to question whether the defendant is competent to

stand trial. *State v. Kuhs*, 223 Ariz. 376, ¶ 13, 224 P.3d 192, 196 (2010) (due process requires procedures adequate to protect defendant's right not to be tried or convicted while incompetent); *see* Ariz. R. Crim. P. 11.2(a). "The presence of a mental illness . . . alone is not grounds for finding a defendant incompetent to stand trial." Ariz. R. Crim. P. 11.1; *see State v. Moody*, 208 Ariz. 424, ¶ 56, 94 P.3d 1119, 1139 (2004). Instead, "[t]he inquiry is whether [the] defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding[,] and whether he has a rational as well as a factual understanding of the proceedings against him.'" *Bishop v. Superior Court*, 150 Ariz. 404, 406, 724 P.2d 23, 25 (1986) (third alteration in *Bishop*), *quoting Dusky v. United States*, 362 U.S. 402, 402 (1960).

¶7 In support of his motion for a competency evaluation, Smith asked the trial court if it would like to see the minute entries from cause CR20101256001, indicating that he had been found incompetent and later restored to competency. The trial court suggested that it had read the reports from that case and explained that Smith's diagnoses for Asperger's syndrome and a mood disorder were, standing alone, not sufficient grounds to warrant an examination.[1] The court further noted that during the previous proceedings, Smith eventually had been restored to competency in September 2010. The court reasoned that because Smith had been found competent "that short a time ago," he had provided

[1]The minute entry and reports were not admitted as exhibits in the trial court. In his second motion to enlarge the record on appeal, Smith asked this court to amend the record to include psychological evaluations and transcripts from hearings in cause CR20101256001. We denied the motion. Although Smith now argues this court erred in denying the motion, our order is not an appealable order. *See* A.R.S. § 13-4033. And, in any event, our review is restricted to the record before the trial court, *State v. Herrera*, 232 Ariz. 536, ¶ 24, 307 P.3d 103, 113 (App. 2013), and there is no indication that Smith ever presented the court or the state with an opportunity below to consider the transcripts or psychological evaluations from CR20101256001.

insufficient information to warrant another evaluation. However, the court granted Smith leave to re-file the motion if additional evidence concerning his competence arose.

¶8 On appeal, Smith contends the trial court "improperly considered extrinsic evidence" when it "made reference to the Rule 11 proceedings held in [the prior] cause." He maintains "[d]ue process and fundamental fairness dictate that a trial judge, in making a substantive decision, should not consider evidence that is not a part of the record." Smith did not make this argument below and has therefore forfeited review for all but fundamental, prejudicial error. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 7, 185 P.3d 135, 138 (App. 2008). Moreover, because he does not meaningfully argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See id.* ¶ 17 (fundamental error argument waived on appeal if not argued); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it.").

¶9 Smith next argues the trial court "completely abdicated [its] responsibility" to inquire into his competency by "concentrat[ing] on the fact that [he] had been restored to competency approximately [ten] months earlier and ignor[ing his] current medical condition." We disagree. A court is not prohibited from considering evidence from an earlier competency hearing. *See State v. Bishop*, 137 Ariz. 5, 7-8, 667 P.2d 1331, 1333-34 (App. 1983) (relying on prior competency proceeding). But a previous finding of competency is not an "'immutable historical fact.'" *State v. Messier*, 114 Ariz. 525, 526, 562 P.2d 402, 406 (App. 1977), *quoting Rose v. United States*, 513 F.2d 1251, 1256 n.5 (8th Cir. 1975). Although the court may in its discretion order a new examination if warranted, the defendant must present "some reasonable ground to justify another hearing on facts not previously presented to the trial court," *State v. Contreras*, 112 Ariz. 358, 360-61, 542 P.2d 17, 19-20 (1975), even if the initial evaluation occurred in a separate cause number, *see Messier*, 114 Ariz. at 523, 526, 562 P.2d at 403, 406.

¶10 Smith nevertheless contends that trial counsel "alleged no less [than] two times that [Smith] was unable to assist [counsel],"

whereas "virtually all the cases considering whether the trial court had abused its discretion[] have typically cited the fact that 'there was no avowal of counsel.'" Although the absence of an attorney's avowal has been cited as a factor in determining whether the trial court has abused its discretion in refusing a request for a competency examination, *see State v. Roper*, 140 Ariz. 459, 463, 682 P.2d 464, 468 (App. 1984), it is not the deciding factor, *see State v. Romero*, 130 Ariz. 142, 146-47, 634 P.2d 954, 958-59 (1981) (holding no abuse of discretion in refusing to order competency examination based on opinions that appellant had "'severe mental problems'"). And unsupported statements "relating to [a] defendant's low intelligence, moodiness, confusion, and inability to clearly relate the facts involved" are insufficient to warrant a mental examination under Rule 11. *State v. Verdugo*, 112 Ariz. 288, 289, 541 P.2d 388, 389 (1975). Smith did not present any evidence to support his attorney's avowals, and instead, referred to cause CR20101256001, suggesting that the prior incompetency finding gave rise to a presumption of continued incompetency. But Smith does not provide any authority, and we can find none, that indicates such a presumption would continue after the court later found that Smith had been restored to competency. *See* Ariz. R. Crim. P. 11.6; c*f. State v. Bradley*, 102 Ariz. 482, 487, 433 P.2d 273, 278 (1967) ("rebuttable presumption of continued incompetency" applied when, under former rule, court elected not to conduct formal redetermination of competency before proceedings restarted), *overruled on other grounds by State v. Harvill*, 106 Ariz. 386, 391, 476 P.2d 841, 846 (1970).

¶11 Moreover, here, the court granted Smith leave to re-file the request for a Rule 11 evaluation, yet he never did.[2] The trial

[2]Although not raised by the parties, our review of Smith's trial transcripts further bolsters our conclusion. On the second day of trial, Smith's counsel stated that he would need to "assess [his] client's mental abilities" after learning that Smith had been on suicide watch over night. But, counsel apparently dismissed his concerns because he did not raise the issue again. *See State v. Amaya-Ruiz*, 166 Ariz. 152, 163, 800 P.2d 1260, 1271 (1990) (suicide attempt not indicative of inability to assist counsel). Moreover, the same judge presided over both the sentencing in CR20101256001 and the

court did not abuse its discretion in denying Smith's motion for a competency evaluation. *See Lane*, 128 Ariz. at 361, 625 P.2d at 950.

Jury Instruction

¶12 Smith next argues "the jury instruction placing the burden of proving the operability of the guns on [him] and that his right to possess a firearm has been restored unlawfully shifted the burden of proof and violate[d] due process." Although we review a trial court's decision to give a jury instruction for an abuse of discretion, "we review de novo whether jury instructions accurately state the law." *State v. Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d 786, 787 (App. 2008).

¶13 Due process requires the state to prove beyond a reasonable doubt every fact necessary to establish the elements of alleged criminal conduct in a case. *State v. Farley*, 199 Ariz. 542, ¶ 10, 19 P.3d 1258, 1260 (App. 2001). But the defendant generally has the burden of establishing facts to support an exception or affirmative defense to the crime. *State v. Rosthenhausler*, 147 Ariz. 486, 493, 711 P.2d 625, 632 (App. 1985). The crime at issue here, weapons misconduct, occurs when a person knowingly "possess[es] a deadly weapon . . . if such person is a prohibited possessor." A.R.S. § 13-3102(A)(4). Prohibited possessors include anyone "who has been convicted within or without this state of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored." A.R.S. § 13-3101(A)(7)(b).

¶14 In *State v. Kelly*, this court addressed whether this last clause—the non-restoration of the defendant's civil right to carry a firearm—was an element of, or exception to, the offense. 210 Ariz. 460, ¶¶ 2, 4, 112 P.3d 682, 683 (App. 2005). The trial court had concluded, "based on [its] reading of the plain language of § 13-

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trial in this case, had "known Mr. Smith for a while," and "underst[ood] that he can get emotional," but never questioned his competency in this case. *State v. Moody*, 208 Ariz. 424, 443, 94 P.3d 1119, 1138 (2004) (court may rely "on [its] own observations of the defendant's demeanor and ability to answer questions").

3101(A)(6)(b)," that non-restoration must be an element of weapons misconduct.[3] *Id.* ¶ 4. On special action review, we acknowledged that this court and our supreme court had both "implicitly regarded nonrestoration of the right to be an element." *Id.* (citing *State v. Hudson*, 152 Ariz. 121, 127, 730 P.2d 830, 836 (1986), and *State v. Lopez*, 209 Ariz. 58, ¶ 8, 97 P.3d 883, 885 (App. 2004)). But, we also noted that these statements "were not holdings but dicta, and are therefore not binding authority." *Id.* ¶ 5. We further noted that before the comprehensive revision of the criminal code in 1978, Arizona had treated the restoration of this right as an affirmative defense to a charge of weapons misconduct. *Id.* ¶¶ 7-8. We therefore concluded that any changed language to the contrary was not the product of legislative intent. *Id.* ¶¶ 6, 8 ("Although we normally assign plain meaning to the words of a statute, we will not do so when a plain meaning interpretation is at odds with the legislature's intent."). We reasoned that, "[t]he negative aspect of th[e restoration] provision makes it extremely ill-suited to be an element of the crime; it would place an onerous burden on the state to prove beyond a reasonable doubt that something has not happened." *Id.* ¶ 9.

¶15 On appeal, Smith urges us to revisit our decision in *Kelly* because its "reasoning does not withstand the test of logic or common sense."[4] He suggests that the statements in *Hudson* and

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[3]Section 13-3101 has been amended multiple times since *Kelly*, but those alterations are not material here. *See* A.R.S. § 13-3101(A)(7)(b); 2004 Ariz. Sess. Laws, ch. 134, § 1.

[4]Smith fails to present any support for his initial argument regarding the inoperability of a firearm as an element of weapons misconduct and has therefore waived it. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall contain argument with "citations to the authorities, statutes and parts of the record relied on"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). The argument is without merit in any event. Our supreme court has endorsed the rule that the inoperability of a firearm is an exception to weapons misconduct. *State v. Valles*, 162 Ariz. 1, 7, 780 P.2d 1049, 1055 (1989), *citing Rosthenhausler*, 147 Ariz. at 490-93, 711 P.2d at 629-

Lopez were not dicta and that the state could prove that a defendant's civil right to carry a firearm has not been restored as easily as it proves prior convictions. "[P]revious decisions of this court are considered highly persuasive and binding, unless we are convinced that the prior decision is clearly erroneous or conditions have changed so as to render the prior decision inapplicable." *State v. Dungan*, 149 Ariz. 357, 361, 718 P.2d 1010, 1014 (App. 1985). The doctrine of stare decisis "is a doctrine of persuasion, not a rigid requirement," but a departure from precedent requires more than an argument "that a prior case was wrongly decided," particularly when the prior case interprets a statute. *State v. Hickman*, 205 Ariz. 192, ¶ 37, 68 P.3d 418, 426 (2003).

¶16 Smith's arguments were addressed and rejected in *Kelly* and he has not persuaded us that the decision is clearly erroneous or that changed conditions have made it inapplicable. *See Dungan*, 149 Ariz. at 361, 718 P.2d at 1014. Therefore, the trial court's jury instructions, based on *Kelly*, correctly stated the law. *See Fierro*, 220 Ariz. 337, ¶ 4, 206 P.3d at 787.

Criminal Restitution Order

¶17 Although Smith has not raised the issue on appeal, we find fundamental error in the sentencing minute entry, which states "all fines, fees, and assessments are reduced to a Criminal Restitution Order [(CRO)], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." *See Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650. "[T]he imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This is so even

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32. And, "'[t]his court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions.'" *State v. McPherson*, 228 Ariz. 557, ¶ 13, 269 P.3d 1181, 1186 (App. 2012), *quoting State v. Long*, 207 Ariz. 140, ¶ 23, 83 P.3d 618, 623 (App. 2004).

when, as here, the trial court delayed the accrual of interest. Nothing in A.R.S. § 13-805,[5] which governs the imposition of CROs, "permits a court to delay or alter the accrual of interest when a CRO is 'recorded and enforced as any civil judgment' pursuant to § 13-805(C)." *Lopez*, 231 Ariz. 561, ¶ 5, 298 P.3d at 910.

Disposition

¶18 For the foregoing reasons, we vacate the CRO but otherwise affirm Smith's convictions and sentences.

[5]Section 13-805 has been amended three times since the date of the offense. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. The changes are not relevant here.